IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN F. KANE, on behalf of himself and all others similarly situated, ANNE M. BRADLEY, on behalf of herself and all others similarly situated, and LEONARD M. CHEST, on behalf of himself and all others similarly situated	:	CIVIL ACTION
v.	:	
UNITED INDEPENDENT UNION WELFARE FUND, JULIA M. BRUNO, FRANCIS J. CHIPPARDI, and MARTIN LIPOFF	:	No. 97-1505

MEMORANDUM AND ORDER

Norma L. Shapiro, J. August 1, 2003

This action was brought under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., and the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), § 1132 et seq.

Plaintiffs are three former participants in the United Independent Union Welfare Fund ("the Fund"). They filed this action individually and on behalf of a class. Defendants Julia M. Bruno ("Bruno"), Francis J. Chippardi ("Chippardi"), and Martin Lipoff ("Lipoff"), are fiduciaries of the Fund. Bruno is also the administrator of the Fund.

Plaintiffs filed their First Amended Complaint on April 21, 1997. On May 2, the Defendants the Fund, Bruno, Chippardi and Lipoff moved to dismiss counts I, II, III, V, VI, VII, VIII, and IX pursuant to Federal Rule Civil Procedure 12(b)(6). The defendants did not move to dismiss Count IV. The court ordered

that the action would proceed on Counts I, II, and III against Bruno, on Count IV against the Fund, and Counts X and XI against Bruno, Chippardi, and Lipoff (collectively, "the trustees"). The court dismissed all other counts. Now before the court are a motion to dismiss Counts II and IV pursuant to Fed. R. Civ. P. 12(c), and a motion for a protective order limiting discovery.

I. MOTION TO DISMISS COUNT IV UNDER RULE 12(c)

In this 12(c) motion, defendants seek a judgment on the pleadings with respect to Count IV of plaintiffs' First Amended Complaint. In Count IV plaintiffs allege that the Fund failed to offer plaintiffs the opportunity to continue medical coverage. They seek to recover the cost of subsequent medical bills from the fund under 29 U.S.C. § 1132(a). In their motion, defendants allege that only the program administrators can be held liable for a lack of notice.

Section 1132(a)states that a civil action may be brought

> "(1) by a participant or beneficiary --
> (A) for the relief provided for in subsection (c) of this section, or
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of plan, or to clarify his rights to future benefits under the terms of the plan[.]"

Subsection (c) provides that a plan administrator may be personally liable for failure to notify individuals of their right to continue health coverage, as required under § 1166. Therefore § 1132(a) authorizes civil actions against plan

administrators under § 1132(c) for failure to notify under § 1166. Several courts, noting these provisions, have held that "it is the plan administrator . . . who is required to give such notice." Philips v Riverside, Inc., 796 F. Supp. 403, 406 (E.D. Ark. 1992). Neither the fund nor the employer is responsible or liable for the administrator's failure to do so. Id. When another court was faced with a similar claim against an insurance company, it held that the plan administrator, rather than the insurance company, "had the duty to inform," with the result being that the insurance company was not liable. Loatman v Metropolitan Life Insurance Co., 1995 WL 418502, p. 8. Since the plaintiffs named only the Fund as defendant in Count IV, the plaintiffs cannot recover as a matter of law on Count IV.

Plaintiffs, in their Memorandum of Law in Response to Defendants' Motion for Judgment on the Pleadings, and Motion for a Protective Order ("Plaintiffs' Memorandum"), admit that defendants' argument "may have some merit." Plaintiffs' Memorandum, p. 7, but cite Van Hoove v. Mid-America Building Maintenance, Inc., 841 F. Supp. 1523 (D. Kan. 1993) to support their contention that a participant and/or beneficiary may recover unpaid medical bills from a health and welfare plan for failure to notify. In Van Hoove, an employer was held liable for subsequent medical costs for failing to inform the plan administrator of the plaintiffs' employment termination within the time required. The court stated that the decision was based on the employer's duty to inform the plan administrator of

plaintiffs' termination. Id. at 1529, 1531. In the present case, the Fund did not have a duty to inform plaintiffs of their continuation rights; that was the duty of the plan administrator, Bruno. Count IV only claims damages against the Fund, so the claim fails as a matter of law. The Fund is entitled to a judgment on the pleadings with respect to Count IV.

II. MOTION THAT COUNT II CLAIMS ARE TIME BARRED

In Count II of the amended complaint, named plaintiffs and all others similarly situated allege that at the time their medical coverage commenced under the Fund, Defendant Bruno failed to give plaintiffs the written notice required by 29 U.S.C. § 1166(a)(1). Plaintiffs Kane, Bradley and Chest received medical coverage when they began working in 1989, 1987, and 1985, respectively. The statute of limitations bars any recovery for failure to provide "in-the-door" notice to any of these three plaintiffs.

However, there is a pending motion for class certification in this action. It is possible that there are other members of the putative class whose claims that they were not given "in-the-door" notice are not time barred. If a class is certified as to this count, one of those claimants would be added as a named class member because the named plaintiffs would not be adequate representatives. See, Kremens v. Bartley, 431 U.S. 119 (1977) (if, during the course of the litigation, the named plaintiffs do not adequately represent the members of the class, substitution

or addition of other named plaintiffs is appropriate). It is premature to dismiss Count II on a motion for judgment on the pleadings.

III. MOTION FOR A PROTECTIVE ORDER

The deposition and discovery rules of the Federal Rules of Civil Procedure, including Rules 26 and 30, must be accorded broad and liberal treatment. Herbert v. Lando, 441 U.S. 153 (1979). The purpose of discovery is to remove surprise from trial preparation, and allow the parties to evaluate and resolve their disputes. Fed. R. Civ. P. 26 is liberally construed to permit discovery of all information reasonably calculated to lead to the discovery of admissible evidence, even if the discoverable information is not admissible at trial. Ragge v. MCA/Universal, 165 F.R.D. 601 (C.D. Cal. 1995).

Rule 26(c) provides that upon motion and for good cause, the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). But a protective order designed to place restrictions on discovery should not be issued unless the party seeking the order makes a particularized showing of "good cause." United States v. Exxon Corp., 94 F.R.D. 250 (D.C. Dist. Col. 1981). The defendants have not sufficiently demonstrated "good cause." It is not uncommon to have discovery for a time preceding the statutory limitations period; there has been no showing that the discovery proposed is

unduly burdensome. With the motion for class action pending and the possibility of the statute of limitations being tolled, it would be inappropriate to bar discovery requests as to events between February 3, 1993 and February 3, 1995.

An appropriate order follows.

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AND NOW, this 19th day of September, 1997, upon consideration of Defendants' Motion for Judgment on the Pleadings and Motion for a Protective order, Plaintiffs' Memorandum of Law in Response thereto, and Defendants' Reply Memorandum, it is **ORDERED** that:

1. Count IV of the Plaintiffs' First Amended Complaint is **DISMISSED**.

2. Defendants' Motion for a Judgment on the Pleadings on Count II based on the statute of limitations is **DENIED** without prejudice to a motion for summary judgment at the conclusion of discovery.

3. Defendants' Motion for a Protective Order to bar discovery requests as to events between February 3, 1993 and February 3, 1995 is **DENIED** without prejudice to a Motion for a Protective Order on other grounds if necessary after suitable efforts of the parties to resolve their differences.

_____
J.